89-752

SUPREME COURT OF THE

UNITED STATES

No.

BARRY WEINSTEIN,

Petitioner

v.

JACK EHRENHAUS and STANELY MESNICK, both individually and doing business as JACK EHRENHAUS ASSOCIATES, and JACK EHRENHAUS ASSOCIATES, a New York Partnership.

Barry Weinstein
P.O. Box 4133
Middletown, N.J. 07748
201-671-2684

150 pp

Q. Can justice function if it is not in touch with reality?

Q. Was this court's directions in the Society International and Hammond Packing cases violated?

Q. Can the District Court predetermine its opinion on an unsubmitted set of facts?

Q. Can it decide to threaten a litigant on the basis of such predetermined opinion?

Q. Furthermore, what should a litigant do when the Chief Judge

of the District Court writes to the litigant that "you have the right to submit the facts as they relate to the law suit," after a copy of the 60 B Motion was presented to District Court Chief Judge in as overseer of all charges of grievances?

Q. 4. Can the District Court after it has destroyed any opportunity of fair discovery, in that it allows itself to be deceived, that the second day of depositions of a two day subpoena is Quashed

Q. If there was no fraud on the Court then why was such stated deposition subpoena quashed?

Q. Is this willful?

Q. Can the District Court hold a litigant to be contumacious and egregious, when that litigant's attorney raises the attorney work-product privilege?

Q. Can the District Court order be allowed to stand?

Q. Was Rule 60(b) enforced?

Q. Was Rule 60(b) properly enforced?

Q. Can the court's order be allowed to stand in the face of the distortions of fact and misrepresentations which permeate that order?

Q. Why?

Q. Why are the courts refusing to believe that they have also been lied to, in a 5 million dollar case when the proof has been placed before them?

Q. Has the Second Circuit Appeals Court violated its own set of precautions regarding Rule 37?

Q. Is this the use of discretion? Is this not obviously a mistake which falls under Rule 60B.

Q. Has the District Court abused its discretion in its order of June 3, 1987 (I-81) in denying Plaintiff leave to amend his Complaint?

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May 1, 1989 2nd Cir.

December 5, 1988 D.C.

S.D.N.Y.

March 14, 1989 S.D.N.Y.

The jurisdiction of this Court is involved on the grounds that the Court of Appeals for the Second Circuit has so far departed form the accepted and usual course of judicial proceedings and so far sanctioned an even more egregious departure by the District Court for the Southern District of New York as to mandate an exercise of this Court's power of supervision.

The petition for writ of certiorari will seek review of the decision of the United States Court of Appeals for the Second Circuit dated May 1, 1989, in the case entitled Barry Weinstein v. Jack Ehrenhaus and Stanley Mesnick, both individually and doing business as Jack Ehrenhaus Associates, and Jack Ehrenhaus Associates, A New York Partnership, Docket Number 89-7033 which affirmed the District Court decision in the case having the same title dated December 5, 1988, Judge Leval, Docket No. 84 CIV 5641 (PNL).

APPLICABLE AMENDMENT TO THE CONSTITUTION

XIV AMENDMENT:

Section 1. All persons born under or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT V

No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This law suit was brought in the District Court for the Sourthen District of New York in August 1984. The original complaint prepared by the Attorney Stuart Lezansky of Finley, Kimble, Wagner, Heine etc. contained fraud, R.I.C.O.,

and a demand for an accounting in a partnership dispute. Mr. Lezansky's Esq. Senior Partner Jerome Kawalski, Esq. directed Mr. Lezansky to reduce the complaint to one containing only demand for an accounting. Shortly thereafter Mr. Kawalsky advised his client (the petitioner here) there was a conflict which would only be resolved by the petitioner leaving the law firms representation. Then Mr. Kawalsky began to represent the defendant Ehrenhaus (in other matters) who had more money than

the Petitioner and had been recently unjustly enriched by about $5,000,000.00 (Five Million Dollars).

When this petitioners attorney filed a motion to amend the complaint to include fraud, the court denied the motion without reason.

In the meantime, the defendants attorneys moved the court under Rule 37 (B) (2)(d) while petitioner was trying to reestablish himself with a satisfactory law firm. In fact they made substantial misrepresentations in the first

Rule 37 Motion (what I call lies) and again made substantial misrepresentation in their second Rule 37 Motion.

Though the lies were pointed out to the Judge, in print, no hearing was held. No warning was given by the court, no advice of a New York State Assistant Attorney General one Arthur Wolfish, Esq. of the syndication division was sought. These facts were totally disregarded by the District Court and Court of Appeals.

Petitioners attorneys also

appealed to the District Court for rehearing and reargument under Rule 60 which application by petitioners was incomplete and was denied because the attorneys affadiviy was not made on personal knowledge.

This then brings us to this Supreme Court. The basis for federal jurisdiction in the court of first instace was 28 U.S.C.A. 1331 based on the diversity of citizenship of the parties and an amount in contraversy which exceeded $10,000.00.

The District Court discusses essentially three reasons for applying Rule 37 in this case.

1. The changing of attorneys five times willfully by the Plaintiff, in order to harm the defendants.

2. Violation of two Court Orders.

3. The filing of a Lis Pendens.

The findings are unsupported by the facts.

The facts are that the plaintiffs first law firm withdrew from representing the

plaintiff due to a conflict of interest. This conflict took place about the tenth month of representation which was on a contingent fee basis. Then the partner of the plaintiff's former law firm Finley, Kumble, Wagner, who had been representing Plaintiff, began to represent the defendant very shortly thereafter.

After paying fees of about $30,000.00, to Plaintiff's third law firm who refused to take a contingent fee, Plaintiff ran out of money, and moved to another law firm on a contingency basis,

Blaustein & Wasserman.[1].

Blaustein and Wasserman withdrew from representation of Plaintiff as stated, by the Plaintiff's then attorney, Wasserman, Esq., in an affidavit presented to the Appeals Court. Wasserman states it was entirely his decision to end the arrangement. This has been disregarded by the Appeals Court.

A hearing will prove the fact that there was no

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[1]. Plaintiff;s second firm was only in the case for a few months to protect Plaintiff's interests while Plaintiff searched for new attorneys.

willfulness
in this matter now before the
U.S. Supreme Court.

See Society International,
357 US 198

The District Court relied on the statements of an associate attorney of the Blaustein & Wasserman law firm a Mr. Herstic, Esq., who states to the District Court that Mr. Wasserman, Esq. was Plaintiffs attorney yet, the District Court relies on Mr. Herstics' statements in its order. Yet, when I offer proof to the contrary emanating from Mr.

Herstic's own office in the form of letters and taped conversations, the court disregards them.[2]

It should be also noted that the District Court finding that "from the beginning this litigation has been carried out in bad faith" is contradicted by a letter to the court by the defendants own attorney in he states that essentially discovery is moving along rather well about one year after this law suit began. Therefore, is Rule 60(b)

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[2]. Proof is available upon request of any court.

being properly interpreted by the court?

There has been no hearing, no warning and no consideration of the sworn affidavits of two attorneys and a non-party witness as well as total disregard of court transcript documents all of which irrefutably contradict the District Court findings.

Evident perjury, fraud, suppression of discoverable documents, misconduct by the defendants and their attorneys, fraud on the court, no hearing - no interest, no Justice.

The District Court prevented

the Plaintiff from any fair opportunity at discovery and when the Plaintiff found evidence on his own after discovery had closed, the court invoked Rule 37 for, in substantial part, Plaintiff violating, discovery rules.

Proof is available upon request of the Court.

Q. Can justice function if it is not in touch with reality?

In its July 22, 1987 Order the District Court permits the defendants to depose an Attorney General of the State of N.Y., Syndication Division, Mr. Arthur

Wolfish, upon whose opinion Plaintiff relied as well as other parties, such as Mr. Lee Bailey of the Criminal Investigation Division of the I.R.S., and Mr. Peter Richards, Esq. an expert on R.I.C.O. who now serves as a member of the N.J. Task Force of the Attorney General's Office in the R.I.C.O. Dept.

The court apparently realized that no misconduct on the part of plaintiff existed if he in fact relied on the opinions of two attorneys and an I.R.S. special agent. The District Court granted the Defendants the

right to depose Mr. Wolfish, Bailey and Richards.

Yet the defendants and their attorneys made no effort to depose Mr. Wolfish or Mr. Bailey upon who's opinion plaintiff did rely, and did depose Mr. Richards.

The defendants merely filed a motion to dismiss this law suit including unfounded accusations of Plaintiff's misconduct, and then the District Court Judge, disregarding its own concerns of proof from Investigation, and dismissed the law suit.

This is misconduct and a

misapplication of Rule 37 covered under mistakes of Rule 60(b). It appears that this law suit was dismissed punitively.

See Society International 357 US 197 p. 33 P 111 1, 2 L Ed. 2d 1a.

(a) Dismissal under Rule 37 will not be upheld if only punitive in nature.

(b) The dismissal under Rule 37 will be upheld if it is a permissive presumption by the fact finder that the noncompliance with discovery order is either due to lack of merit or for the purpose of

suppressing damaging evidence. See Hammond Packing v. Arkansas, 212 US 379.

(c) The Supreme Court holds that "substantial Constitutional questions are provoked by such actions" "and therefore any reasonable showing of an inability to comply would have satisfied the requirement."

In McCandless v. Beyer, 835 F. 2d 60 (3rd Cir. 1987). "A permissive presumption does not offend due process if there is a rational connection between the basic facts and the ultimate fact presumed and the latter is

more likely than not to flow from the former.....

2. Tape production see Hammond Packing v. Arkansas 212 U.S. 379 Haskell v. Philade. 19 F.R.D. 357

Presumption here is invalid as defendants had the tapes in their possession. A bogus reason libel allegation was presented to the court as the reason for Plaintiffs withholding of the tapes, yet Defendants later opted to voluntarily dismiss that defamation action. There was nothing in the tapes either damaging to the Plaintiff or

which showed Plaintiffs claim to lack merit Furthermore a sworn Affidavit as to the tapes whereabouts in this matter exists.

Surely the counsel for the defendants would have brought it to the District Court's attention. Instead, Defendants told the court that the reason for withholding the tapes by the Plaintiff was fear of slander or libel claims unrelated to the matter at bar. In order to submit papers to the District Court after the close of being on time. One of the attorneys tried

to deceive Plaintiffs counsel by advising him that the court had indeed granted permission to file late. The District Court denies this in the Index Record.

Q. Was this court's directions in the Society International and Hammond Packing cases violated?

The loss of the tapes would have been very damaging to Plaintiff if he was unable to locate them.

3. Rule 60(b) allows for a separate action specifically for fraud on the court.

Q. Can the District Court predetermine its opinion on an

unsubmitted set of facts?

Q. Can it decide to threaten a litigant on the basis of such predetermined opinion?

Q. Furthermore, what should a litigant do when the Chief Judge of the District Court writes to the litigant that "you have the right to submit the facts as they relate to the law suit," after a copy of the 60 B Motion was presented to District Court Chief Judge in as overseer of all charges of grievances?

Q. 4. Can the District Court after it has destroyed any opportunity of fair discovery, in

that it allows itself to be deceived, that the second day of depositions of a two day subpoena:

Should be quashed when the documents derived from the first day of deposition proved one of the issues in the complaint clearly and distinctly made visible the perjury/fraud by the defendants in their depositions. Proof of the value upon the first day of the depositions of Bank Leumi upon request of the Court.

See Dart Industries v. Westwood Chem. Co., 649 F. 2d 646 (Ninth Cir. 1980), In Re:

Attorney General of U.S., 596 F.2d 58, etc. (2d Cir. 1979), Reeves v. Pennsylvania, 80 F. Supp. 108, 190, Kerr v. U.S. District Court, 426 U.S. 404: Halkin v. Helms, 589 F.5 (1978) under procedure [2], Roadway Express Inc. v. Piper, 447 U.S. 766.

Q. If there was no fraud on the Court then why was such stated deposition subpoena quashed?

Further, the Plaintiff was not allowed to depose for a second day one of the defendants named in the complaint, even though the record shows that on

the first day of that defendant's deposition he was completely evasive in his answers, and that the only production of document made by him was his business card and one other piece of paper. There must have been misrepresentations to the Court in order to accomplish this, or at the very least, an unconscious bias against Plaintiff.

Q. Can the District Court hold a litigant to be contumacious and egregious, when that litigant's attorney raises the attorney work-product privilege?

Q. Is this a violation of a

court order?

Q. Is this willful?

This Court has clearly stated that the imposition of Rule 37 may not be punitive in nature. Yet such cautioning by this Court has obviously been thrown to the wind, in this case, since Rule 37 sanctions were applied substantially in part to the filing of a lis-pendens in New York State Court and may only be applied for discovery violations.

Q. Can the District Court order be allowed to stand?

The "facts" found by the

Court are contradicted by the sworn affidavit of an attorney who worked for another of the Defendant's law firm during the relevant time period. The Federal Rules of Civil Procedure 60(b)(2) provides for relief based upon newly discovered evidence.

a. The new evidence was discovered following the trial.

b. The evidence is not merely cumulative or impeaching.

c. Due diligence on the part of the movant to discover the new evidence is shown or may be inferred.

d. The evidence is material.

e. The evidence is such that a new trial would probably produce a new result.

The sworn affidavit of the officer of court, mentioned above, John Higgenbotham, Esq., contradicts the District Courts findings that the defendants complied with all court orders during discovery.

Mr. Higgenbotham, Esq., was employed, not by the defendants, but by a law firm that did work for the defendants. Mr. Higgenbotham's job was the

preparation of documents for the law firm, many involving the defendants. One such document is a partnership agreement between the Defendants which has been suppressed. Add to that the Defendants statement in depositions that Plaintiff had the same relationship as the defendants, as well as the court ordered finding to that affect, as well as the approximately 1000 pages (or 1/3 of all documents produced) of other suppressed documents, provided by the Plaintiff to the appeals court in a graphic example during actual

oral arguments. Proof upon request of this court as to the volume of documents.

Q. Was Rule 60(b) enforced? (See, Rosier v. For Motor Co., 573 F 2d 1332; Patapoff v. Vollstedts, Inc., 267 F 2d 863; Estate of Murdoch v. Commonwealth of PA, etc., 432 F 2d 87; Montgomery v. Hall, 592 F 2d 279.

The attorneys for the defendants were not merely "zealously" defending their clients, they have in a number of instances completely distorted the factual truth (what I call lied) regarding plaintiff

to the court. Proof upon request of this Court, as to the distortions.

Q. Was Rule 60(b) properly enforced?

See Wilkin v. Sunbean Corp. 466 F 2d 716; H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F 2d 1119 (1976) (6th Cir.) Metlyn Realty Corp. v. Esmark Inc., 763 F 2d 832.

Q. Can the court's order be allowed to stand in the face of the distortions of fact and misrepresentations which permeate that order?

Q. Why?

Since Rule 60 has replaced the corum nobus and corum vobis writs of factual error correction, the appeals Court has not ordered the factual errors in the District Court order corrected.

Root Refining Co. v. Universal Oil Prod. Co., 169 F 2d 514 and 325 U.S. 575 and 580.

These defendants have filed fraudulent documents with the N.Y. Attorney General's office and mailed real estate syndication documents all over the country which contain lies to a large numbers of investors.

This has been proven to the court or rather the documents were provided to the courts.

Q. Why are the courts refusing to believe that they have also been lied to, in a 5 million dollar case when the proof has been placed before them?

Q. Has the Second Circuit Appeals Court violated its own set of precautions regarding Rule 37? See Harding v. Federal Reserves Bank of New York, 707 F.2d 46 (1983) (2nd Cir.) at page 50, See Insurance Corp. v. Compagnie Des Bauxite, 456 U.S. 694 1981. Furthermore, See Orvis

v. Higgins 180 F.2d 539 (1950) (2nd Cir.). Regarding Attorney Work Product Privilege Hickman v. Taylor, 329 U.S. at 512.

The District Court says in its June 28, 1988 Order, that:

> Plaintiff was well aware that deliberate disregard of this Court's Orders might result in harsh sanctions including dismissal; Plaintiff's conduct had been the subject of an earlier motion for sanctions and the Court threatened the Plaintiff with sanctions for the filing of the false lis pendens.

(A-129-130). These statements in fact demonstrate that there were

never any proper warnings regarding sanctions.

With regard to the earlier motion, the fact is that the Court denied the motion and refused to find that Appellant had engaged in any conduct justifying the imposition of any sanctions. That decision did not contain any warnings. (Exhibit D). The fact that one party moves against the other for sanctions cannot be considered a warning where the motion is denied and no warning accompanies the denial.

With regard to the lis

pendens, the District Court told Appellant that it would dismiss the Complaint unless he released the lis pendens. Appellant then released the lis pendens. This warning was specific to one act which Appellant engaged in and was in no way referable to any other conduct before or after. In addition, Rule 37 is limited to failure to make or cooperate in discovery and by its terms can not cover the lis pendens issue.

Therefore, it was an abuse of discretion for the District Court to refuse to relieve Appellant from the dismissal

where the dismissal was based upon Rule 37 and no adequate or proper warning preceded it.

Regarding Plaintiffs counsels affidavits and lack of hearing please see Flaks v. Koegel 504 F.2d at 712 (2nd Cir.) Edgar v. Slaughter 548 F.2d 773. Also see Israel Aircraft Ind. Ltd. v. Standard Precision, 559 F. 2d 207-208 (2nd Cir. 1977), Link v. Wabash, 370 U.S. 632 1961,

Regarding the compliance with the court order see Insurance Corp. Compagnie Des Bauxite 456 U.S. 707-708-709.

The Supreme Court in National Hockey League v. Metropolitan Hockey Club 427 U.S. at 641 states: "Moreover this action towards taken in the face of Warnings that their failure to provide certain information could result in the imposition of sanctions under Federal Rule Civ. P. 27." In the case at bar only motions to dismiss, and not any warnings by the court, exist.

Q. Is this the use of discretion? Is this not obviously a mistake which falls under Rule 60B.

Q. Has the District Court

abused its discretion in its order of June 3, 1987 (I-81) in denying Plaintiff leave to amend his Complaint?

It does appear the District Court has abused its discretion. See Foman v. Davis, Executrix, 371 U.S. 182. The court states: "But outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules The judgment is reversed."

This is exactly what

happened in the case here being appealed. See order of June 3, 1987,

IN CONCLUSION:

Hundreds of hours have been invested by the various courts in pursuit of Justice.

If the above claims made by the petitioner are inaccurate than a hearing of another few hours would not be an excessive exercise.

But, if the claims made above are accurate then a hearing (which so far has not been granted) would prevent a gross injustice and would expose the misconduct of the parties.

BARRY WEINSTEIN, being duly sworn, deposes and says:

that three (3) true copies of Petition for Certification was sent via certified mail, postage prepaid to the following:

MARTISS V. ANDERSON
Goodkind, Wechsler, Labton & Rudoff
122 East 42nd Street
New York, New York 10168
(212) 490-2332

DOUGLAS COOPER
175 Memorial Drive
New Rochelle, New York 10801
(914) 636-5100

BARRY WEINSTEIN

Sworn and Subscribed
to before me this 25th
day of August, 1989.

Kim Nitka

KIM NITKA
Notary Public of the State of New Jersey
My Commission Expires
June 6, 1993

SOUTHERN DISTRICT OF NEW YORK

Weinstein 84 CIV. 5641

-against - ORDER

Ehrenhuas

Defendant

Plaintiff's motion (1) for leave to file an Amended Complaint (2) for further answers of Interogatories and (3) to restrain sale of property is denied.

The motion of defendants for additional discovery is granted.

The motion of defendants to amend the answers to assert counterclaim is denied. Their motoins for sanctions are denied with leave to renew upon the conclusion fo the litigation or on further order.

SO ORDERED: /s/ PIERRE N. LEVAL

Dated: June 3, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

BARRY WEINSTEIN,

Plaintiff, 84 Civ. 5641 (PLN)

-against-

ORDER

JACK EHRENHAUS and STANLEY MESNICK, both individually and doing business as JACK EHRENHAUS ASSOCIATES and JACK EHRENHAUS ASSOCIATES, a New York partnership,

Defendants.
----------X

Dated: July 22, 1987

PIERRE N. LEVAL, U.S.D.J.

This is a motion by defendants to compel discovery as

to which plaintiff claims attorney-client and/or work product privilege. Defendants earlier moved for sanctions against the plaintiff by reason of actions taken by the plaintiff in filing a lis pendens against the advice and without the knowledge of his attorney. In opposition to the defendants' motion and in justification of his own conduct, plaintiff offered an opinion given to him my Peter Richards, Esq. as well as statements made to him about the merits of his claims by Arthur Wolfish, Esq. and Lee

Bailey. Plaintiff contended that the opinion furnished to him and the statements made to him gave him reason to believe that his conduct was appropriate. If plaintiff relies on opinions and statements given to him by counsel and third persons, it becomes highly relevant what representations of fact plaintiff made to those persons which served as the basis of the opinions they expressed. If, for example, the plaintiff obtained those opinions and statements by advising counsel and the third persons of facts

which plaintiff cannot substantiate, plaintiff's entitlement to rely on them would be substantially impaired. Although plaintiff might have been entitled to claim the attorney-client or work-product privilege as to these opinions and statements if he had not proffered them as self-justifications, by so doing he has waived any privilege he might have had. The defendants should be entitled to explore the information furnished by plaintiff to those persons in order to rebut plaintiff's

entitlement to rely on the opinions they expressed to him. Plaintiff's objections to this discovery are overruled. Messrs. Richards, Wolfish and Bailey may be deposed. Defendants also seek disclosure of certain tape recordings made by plaintiff during his investigations. Defendants had earlier made a discovery demand seeking disclosure of any such tape recordings in existence. Plaintiff would have been entitled at the time to avoid such disclosure by asserting the work-product privilege under Rule

26(b)(3) F.R. Civ. P. Instead of doing so, plaintiff neglected to inform his counsel of the fact that the tape recordings had been made. As a result, an affidavit was presented to the court which omitted this fact. By reason of his failure to disclose the existence of the tape recordings in his affidavit to the court, the court finds that the plaintiff has waived the work-product privilege he otherwise would have had. Accordingly, plaintiff is directed to produce such tape recordings as he had made prior to his submission of

the affidavit on April 3, 1987.

Dated: New York, N.Y.
July 27, 1987

SO ORDERED:

_____

Pierre N. Leval, U.S.D.J.

001/bw

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Secornd Circuit, held at the United States Courthouse in the City of New York, on this tenth day of February one thousand nine hundred and eighty-nine.

S.D.N.Y.

84 civ 5641
In Re: Barry Weinstein,

Leval

Pettitioner

A motion having been made herein by appellant pro se for Writ of Mandamus

Upon consideration thereof, it is Ordered that said motion be and hereby is DENIED.

Circuit Judges

This cáuse came on to be heard on the transcropt of recond from said district court and was argued by appellant pro se and by counsel for the appellees.

The judgment of the district court is AFFIRMED substantially for the reasons stated by Judge Leval in his opinion dated March 14, 1989.

Defendants' request for remand for minetary sanctions in the absence of a cross-appeal and defendants request for sanctions on appeal are denied.

Thomas J. Meskill, U.S.C.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARRY WEINSTEIN,	
	84
CIVIL ACTION 5641 (PNL)	
Plaintiff,	
vs.	
ORDER	
JACK EHRENHAUS, et al	
Defendants.	

Defendant Ehrenhaus, having stated that Defendant Mesnick was employed in the same status as plaintiff (with the exception

that Mesnick negotiated for and was granted a higher percentage participation of deals in which he earned a participation);

Defendants Ehrenhaus and Mesnick are directed to furnish to Plaintiff sworned statements describing the basis of Mesnick's compensation; identifying those deals in respect to which Mesnick received compensation; and identifying the reason for Mesnick's receipt of compensation with those deals.

SO ORDERED:

New York, New York
April 11, 1986
/s/ Pierre N. Leval
PIERRE N. LEVAL, U.S.D.J.

PIERRE N. LEVAL, U.S.D.J.

Defendants move for an Order pursuant to Rules 37(b) and 37 (d) F.R. Civ. P. dismissing the complaint for plaintiff's failure to comply with the discovery orders and failure to appear at his own deposition. The motion is granted.

BACKGROUND

The complaint alleges that

the defendants Jack Ehrenhaus and Stanley Mesnick admitted plaintiff Barry Weinstein into membership in a real estate partnership doing business under the name Ehrenhaus Associates, that as a partner he was entitled to a participation in the profits of the partnership, that during the four months in which he was a partner the partnership acquired 18 East 41st Street and that he is entitled to a accounting for the profits of the partnership during those four months, including profits resulting form

the acquisition of that property.

Defendants deny that Weinstein was ever admitted to membership in the partnership. They assert that plaintiff was employed under a agency agreement entitling him to fifteen percent of the profits of any transaction he brought to the firm.

The action was commenced on August 8, 1984. From the beginning, plaintiff conducted this litigation in bad faith. His prosecution of the action has been marked by his refusal to appear for deposition, failure to

turn over properly demanded disclosure in spite of court order, evasiveness in complying with defendants' legitimate discovery requests, and the fraudulent filing of a lis pendens. Twice, I have considered imposing sanctions on plaintiff for his contumacious conduct. Plaintiff has repeatedly changed lawyers and is now represented by his fifth attorney.

On November 30, 1984, the court issued its first scheduling order, setting June 21, 1985 as

the date for close of discovery. Defendants initiated discovery by serving requests for production of documents and a notice of take Plaintiff's deposition on March 12, 1985. Walsh Aff. ¶2. Plaintiff did not produce the requested documents and failed to appear for his deposition. The purported reason for plaintiff's failure to comply with discovery was the withdrawal of plaintiff second counsel of record after plaintiff had failed to make payment for the representation. Mukasey Aff.¶3.

Following substitution of counsel, discovery commenced anew and plaintiff's deposition was scheduled for April 30, May 7, and May 9, 1985. Plaintiff appeared at first; however, on May 9, 1985, Weinstein announced through counsel that he was "unwilling to proceed further" with the [1] deposition.

With the consent of both parties, the original date for

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1. Plaintiff's first set of attorneys, Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, withdrew form the representation on August 8, 1984 due to a conflict of interest.

close of discovery was extended first to September 20, 1985 and then to October 25, 1985. Counsel then agreed that Wenstein's deposition would continue on October 17 and 18, 1985, just prior to the date the court ordered for the close of discovery. Walsh Aff.(17. On October 4, 1985, however, Weinstein through counsel informed the defendants that he would not appear for the scheduled deposition. The purported reason was again plaintiff's counsel's request to

withdraw as counsel in part for plaintiff's failure to pay bills for legal fees. Walsh Aff. (19.

Aggrieved by plaintiff's continued failure to appear for deposition, defendants thereupon filed a motion for sanctions under Rule 37, F. R. Civ. P. By Order of February 6, 1986, I denied defendant's motion for sanction, directed the plaintiff to submit to completion of his deposition within 30 days, and set the date for completion of discovery for April 15, 1986. Order of Feb. 6, 1986.

The litigation then moved on to another front. Much of plaintiff's claim centers on the property at 18 East 41st Street owned by Ehrenhaus Associates through the limited partnership of Manhattan Fifth Avenue Associates. In the fall of 1986, defendant entered into an agreement to sell the property with the closing to be accomplished by December 29, 1986 for tax reasons. When Weinstein learned of the proposed sale, he filed a lis pendens in state court against the property

continuation of plaintiff's deposition, which they agreed to change to August 21, 1987. Cooper Aff. Sec. 27. On August 26, the eve of the deposition, plaintiff through counsel informed the defendants that he would not appear the next day for the deposition. The reason was, once again, that his fourth set of attorneys, Blaustein and Wasserman, had decided to seek to be relieved.

Defendants thereupon, on September 30, 1987, filed the instant motion for an Order

dismissing the complaint. On October 2, 1987, Blaustein and Wasserman formally moved to be relieved as counsel and, on November 12, 1987, Paul K. Rooney, P.C. was substituted as counsel for the plaintiff. After the present motion was filed, plaintiff turned over copies of tape recordings to defendants, Power Aff. Sec. 6.

DISCUSSION

The discovery process under the Federal Rules of Civil Procedure is designed to allow parties to narrow the issues, obtain evidence for use at trial, and secure information about the existence of evidence. Wright & Miller, Federal Practice and Procedure, Civil 2d Sec. 2001 (1970). Conducted properly, it avoids a trial in which the victor is determined by surprise and concealment rather than by

the merits of the cause.

Rule 37 provides a variety of available sanctions to assure proper discovery. See National Hockey League v. Metropolitan Hockey League, 427 U.S. 639 (1974) (per curiam); Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979). Among the sanctions authorized by Rule 37 are orders reimbursing the opposing party for expenses, striking out portions of the pleadings, prohibiting the introduction of

evidence, deeming disputed issues determined adversely to the position of the disobedient party.

The most severe in the spectrum of sanctions, National Hockey League v. Metropolitan Hockey League, 417 U.S. at 640; Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F. 2d at 1066, is an order "dismissing the action or proceeding." F.R. Civ. P Rule 37(b) (2) (D). This sanction should rarely be used, especially when the noncompliance is not

attributable to willfulness, had bad faith or fault. Sociate Internationals Pour Particupations Industrialles et Commerciales, S.A. v. Rodgers, 357 U.S. 197, 212 (1958). Where, however, the party in noncompliance has acted willfully, the Supreme Court has instructed that the dismissal sanction "must be available to the district court. . . not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to

such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hickey League, 427 U.S. 639, 643 (1974) ; see Ford v. American Broadcasting Co., 101 F.R.D. 664, 667 (S.D.N.Y. 1983).

This plaintiff's conduct has been egregious throughout the litigation. He has failed to appear at three scheduled depositions, and has been evasive and uncooperative when he has attended. He has improperly attempted to circumvent this court's jurisdiction through a

without knowledge of his counsel. In the lis pendens plaintiff falsely stated that the action in this Court was for specific performance and was against Manhattan representations, plaintiff met the state law requirements for a lis pendens.[2]

Subsequently on November 25, 1986, Weinstein's counsel, unaware of the lis pendens

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[2] Under New York law, a lis pendens may be filed without notice where "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property." N.Y. Civ. Prac. Law)6501 (McKinney 1980)

Weinstein had secured, filed a motion to restrain the sale of the property, or, in the alternative, to deposit the proceeds of the sale and all closing documents evidencing the sale with the Court.

Meanwhile, at the closing of the property in December 1986, a title search revealed the existence of the lis pendens. The lis pendens would have prevented the closing and deprived the parties of the tax benefits that depended on concluding the transaction before

December 31. An urgent telephone conference was held with this Court. Plaintiff initially refused to lift the lis pendens. Only after I threatened sanctions did plaintiff agree to vacate the lis pendens.

In his November 25, 1986 motion, Weinstein had also sought leave to amend his complaint to assert a fraud count and an order compelling the defendants to furnish more specific answers to interrogatories. At a conference on November 6, 1986, Weinstein's attorney stated that Weinstein

had taped conversations which supported the fraud count. Cooper Affirmation of March 12, 1987 Sec.25.

Defendants cross-moved for Rule 11 sanctions based on the filing of the lis pendens and leave to amend their answers to assert counterclaims for abuse of process and malicious prosecution, and, based upon plaintiff's counsel's representation regarding the tapes, sought discovery of plaintiff's tape recordings of any parties or potential

witnesses.

By Order of June 4, 1987, I denied the motion of both sides to assert new claims, but granted defendants' motion for additional discovery. I also denied the motion for sanctions with leave to renew. Order of June 4, 1987.

The present motion, set against the backdrop of plaintiff's repeated failure to appear for depositions and plaintiff's filing of the fraudulent lis pendens, is based on plaintiff's noncompliance with

my June 4, 1987 Order and a subsequent Order entered July 22, 1987.

The June 4, 1987 Order granted defendants' request for discovery of plaintiff's tape recordings. Weinstein did not produce the tape recordings but advanced a claim he had not earlier asserted -- that the tapes were protected by privilege. I then ordered that the tapes be produced for inspection at the deposition of plaintiff scheduled for July 23, 1987, and ruled against plaintiff

on his claim of privilege on all tapes made prior to April 3, 1987. Order of July 22, 1987.

At the deposition, Weinstein produced only four tapes, refused to let defendant's counsel hear any of them, and stated for the first time that other tapes (as many as four) may have been lost or erased. Weinstein stated that the four tapes were as many as her was "able to find at this point."

At the conclusion of the deposition, the parties set August 10 and 11, 1987 for the

fraudulent lis pendens filing.

The full record demonstrates repeated willful obstruction as well as fraud. Most recently, plaintiff has willfully failed to obey this Court's June 3, 1987 and July 22, 1987 Orders to provide discovery and to attend his own deposition. F.R. Civ. P. Rules 37(b) (2); 37(d).

In their cross-motion for further discovery, defendants clearly requested "any and all tape recordings or mechanical recordation of conversations had by (plaintiff) or by someone on

his behalf with any of the following: a) a party to this action; b) a witness or potential witness; c) or any other person who was contacted by or on behalf of plaintiff in connection with this litigation." My June 3, 1987 Order granted that request. Based on that Order, defendants requested and received a list of all tape recordings made by plaintiff that address this case. The list indicated that conversations with fifteen

individuals were still extant.[3] Plaintiff nevertheless refused in direct violation of my Order to produce the tapes.

By my July 22, 1987 Order, I

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[3] Plaintiff claims that the list of tape recordings which he provided defendants consisted of those recordings that had at one time been made, and that some of those recordings had been erased. Plaintiff did not mention that possibility at the July 15th hearing. Defendant's letter asking for the tape recordings clearly requested a list of those tapes in existence and a separate list of those no longer in existence. Cooper Reply Aff. exh. A. Plaintiff's letter in response identified sixteen tapes only on of which is stated was no longer in existence. Cooper Aff. Exh. C.

directed plaintiff to produce all the tape recordings made prior to April 3, 1987 at his deposition scheduled for July 23, 1987. Plaintiff produced only four tapes of the tapes at his deposition, claiming that the other would not be located, and refused to allow them to be played. Not until after the motion for a sanction was filed did plaintiff produce copies of the 17 tape recordings in his

possession.[4]

At the deposition, Weinstein engaged in a patter of conduct designed to prevent defendants from discovering relevant evidence. Nutello v. Brand, 96 F.R.D. 672,676 (S.D.N.Y. 1983). He refused to reveal where he was working, on whose machine he taped the conversations, and when

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[4] Plaintiff's belated compliance with his discovery obligations does not excuse or in any way mitigate plaintiff's failure to comply with this Court's orders. See Cine Forty-Second Street Theatre Corp, v. Allied Artists Pictures Corp., 602 F.2d 1062,1066 (2d Cir. 1974).

he started making tapes. When asked, he stated that he started making tapes when he started "making tapes".

Plaintiff's production at deposition was inconsistent with his earlier representations to the Court. At the July hearing, he had represented that the dates of the recordings were written on the tapes. However, contrary to that representation, only two of the four tapes produced were dated.

Weinstein then failed to appear for the scheduled

continuation of his deposition on August 27, 1987, informing the defendants of his inability to attend only on the eve of the deposition. The result of these delays is that plaintiff's deposition has yet to be completed, three and one-half years after the suit was filed and almost three years since his deposition commenced.

Plaintiff's assertion that he could not produce the tapes because he was in the process of moving is incredible. Plaintiff was on notice at least as early

as June 3, 1987, the date of my first Order, that he would have to produce all the tapes. At the hearing on July 15, 1987, called to discuss whether plaintiff would have to produce the tapes, plaintiff never once indicated that there might be a problem with their production. Not until he appeared for deposition did Weinstein indicate to the defendants that he did not have a full set of the tapes presently in his possession. After defendants filed their motion to dismiss, and after the entry of a

fifth lawyer whose first task was to contemplate this motion for sanctions, only then did plaintiff finally produce the full set of tapes.

I have considered the factors that the Court of Appeals in Alvarez v. Simmons Research Bureau, Inc., No. 877278 (Slip op. Feb. 18, 1988), suggested should guide the decision to dismiss and I find that they weigh heavily in favor of dismissal, notwithstanding plaintiff;s very belated produced of the delinquent tapes.

Plaintiff's continued obstreperous conduct has prejudiced defendant's ability to develop his case and resulted in additional expense to the litigants and the court system. I have considered alternatives to dismissing this action and have found that they would be an inadequate response to so egregious and willful a pattern of obstruction and disregard of court orders. For the reasons stated, the motion for dismissal under Rule 37 is clearly warranted, and it is hereby

granted.

CONCLUSION

The motion to dismiss under F.R. Civ. P. Rules 37 (b) (2) (D) and 37 (d) is granted

Dated: New York, N.Y.
March 14, 1988

SO ORDERED:

Pierre N. Leval, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BARRY WEINSTEIN,
84 CIV. 5641 (PLN)

MEMORANDUM AND ORDER

Plaintiff,

-against-

JACK EHRENHAUS and STANLEY MESNICK,
both individually and doing business
as JACK EHRENHAUS ASSOCIATES, and JACK
EHRENHAUS ASSOCIATES, a New York Partnership,

Defendants.
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Dated: Dec. 5, 1988
PIERRE N. LEVAL, U.S.D.J.

Plaintiff, Barry Weinstein, moves pursuant to Fed. R.Civ.P. 60(b) (2), (b)(3), for an order vacating this Court's Opinion and Order of March 14, 1988, dismissing the complaint.

This plaintiff's second attempt to reargue the Court's opinion and order of March 14, 1988. By that order I dismissed plaintiff's complaint pursuant to Fed, R. Civ, P. 37(b) and 37 (d) for plaintiff's failure to comply with discovery orders and failure to appear at his own

deposition. The underlining action os for an accounting of profits of a partnership, Jack Ehrenhaus Associates, of which plaintiff alleges he was a partner. The defendants denied that Weinstein was ever admitted to membership of the partnership.

Plaintiff's misconduct in the prosecution of this litigation is set forth in the opinion accompanying the order of dismissal, 119 F.R.D. 355 (S.D.N.Y. 1988), and in the Memorandum Opinion denying plaintiff's motion for

reconsideration. See Memorandum and Order of June 28, 1988. Plaintiff filed a fraudulent lis pendens in state court, failed to attend his own deposition on three occasions, and violated two order of the court requiring him to produce tape recordings he had made in connection with the litigation.

Plaintiff moved for reconsideration, proffering the affidavit of the fifth attorney to represent him in the litigation, Mr. Paul K. Rooney, Esq. The affidavit, which was not made on personal knowledge,

south to attribute plaintiff's defalcations to his prior attorneys. Because the parties had advised that a notice of appeal had been filed, I denied the motion for lack of jurisdiction.[1]. I also indicated that if the court had jurisdiction, the motion would be denied. Although plaintiff argued that he should not be penalized for the wrongdoing of his attorneys, the only affidavit based of personal knowledge, that

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[1] In fact, as the parties now advise, on Ju
Second Circuit granted plaintiff's motion to wit
thereby reinvesting this Court with jurisdiction

of Mr. Weinstien's former attorney Mr. Neal Herstik, Esq., was to the effect that plaintiff was intimately involved in the conduct of the litigation and reviewed all paper submitted by the defendants and by his own attorneys.

Accusing Mr. Rooney of "gross Neglect, " Plaintiff's Affidavit Sec. 44, plaintiff files this motion pro se. The application os supported by plaintiff's affidavit and 56 exhibits. The gist of these submissions is to argue that plaintiff has good claim to

membership in the partnership, that defendants are guilty of fraud and misrepresentation by contending to the contrary, and that defendants have committed misconduct by failing to produce several documents including a letter of intent to purchase a property at 300 Broad Street in Stamford Connecticut, a contract to purchase a property at 315 Fifth Avenue, and a contract for purchase for a property at East 41st Street. The letter of intent, concerning a transaction that never closed, was not relevant to his case; plaintiff's

demand for production of the contract for 315 Fifth Avenue during discovery was denied by the court; finally, the contract for purchase of property at East 41st Street was in fact produced by defendants. Katz Aff. Sec. 3.

The dismissal was based in part of plaintiff's violation of two court orders that he produce tape recordings he had made in connection with the litigation. As "new evidence" on that issue, plaintiff has submitted the affidavit of a Thomas Trabbacco to the effect that plaintiff gave the only copies of the tapes to

Trabbacco in May 1987 for safekeeping and did not retrieve them until September 1987. This new-found claim directly contradicts plaintiff's counsel earlier representation that plaintiff supplied most of the tape recording to his attorneys soon after they were made and before May 1987. Rooney Aff. of April 13, 1988 Sec.27. It would not excuse plaintiff's wrongdoing even it were credible.

The same obstacle prevents my consideration of this motion as precluded my consideration of plaintiff's earlier 60(b)

motion. On July 14, 1988, plaintiff moved the Second Circuit for an extension of time to appeal so that the court could consider his motion to vacate the order of dismissal. By order dated August 15, 1988, the Second Circuit denied the motion for an extension of time and directed appellant to file a motion to reinstate his appeal within fourteen days. Plaintiff thereafter filed a motion to reinstate the appeal and, and by order dated September 7, 1989, the Second Circuit granted the motion to reinstate the appeal.

Briefs have been filed in the Court of Appeals.

As I stated in my earlier order, "the filing of a notice of appeal divests a district court of jurisdiction over matter related to the appeal. See Alvarez v. Simmons Market Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988); Contemporary Mission, Inc. v. U.S. Postal Services, 648 F. 2d 97, 107 (2d Cir. 1981); Leonard v. United States , 633 F.2d 599,, 609-10 (2d Cir. 1980); 7 J. Moore, Moore's Federal Practice Sec. 60.30 [2], at 60-331

(1987)." Memorandum and Order of June 28, 1988 at 3. Because plaintiff has reinstated his appeal, this court lacks jurisdiction to consider the motion.

Even if the court had jurisdiction, plaintiff's motion would be denied. A motion under Rule 60 (b) to vacate a judgment " provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." Rosebud Sioux Tribe v. A & P Steel, Inc., 733F.2d 509, 515 (8th Cir. 1984) (quoting Clark v.

Burkle, 570 F.2d 824, 830-31 (8th Cir. 1987)); accord Metlyn Realty Corp. v. Esmark, Inc., 763 F. 2d 826, 831 (7th Cir. 1985). The moving party has the burden to show the "exceptional circumstances" that warrant relief under Rule 60 (b). Salto v. Hooker Chemical, Durez Plastic & Chemical Division, 119 F.R.D. 7,8 (W.D.N.Y. 1988).

In order to succeed on a motion pursuant to Rule 60 (b) (2) relating to newly discovered evidence, the movant must present evidence that is truly newly discovered or could not have been

found by due diligence prior to trial, United States v. Potamkin Cadillac Corp., 697 F. 2d 491, 493 (2d Civ. 1983), and must establish that it would have produced a different result. Champion Spark Plug Co. v. Gyromat Corp., 88 F.R.D. 526, 527 (D. Conn. 1980), aff'd on opinion below, 636 F. 2d 907 (2d Cir. 1981). There is some questions as to whether a motion under Fed. R. Civ. P. 60(b) (2) is available where there has been no trial or determination of the merits. See Peacock v. Board of School Commissioners of Indianapolis,

721 F.2d 210, 213 (7th Cir. 1983); Westerly Electronics Corp. v. Walter Kikke & Co., 367 F. 2d 269, 270 n.1. (2d Cir. 1966); Flett v. W.A. Alexander & Co., 302 F.2d 321, 324 (7th Cir. 1962); Waker v. Bank of America National Trust & Savings Ass'n 268 F.2d 16, 26 (9th Cir. 1959). But see Anooya v. Hilton Hotel Corp., 733 F. 2d 48 (7th Cir. 1984) (suggesting that 60(b)(2) motion can be addressed to dismissal on statute of limitations grounds). Even if there are circumstances where a dismissal under Fed.R.Civ.P. 37

might be vacated for newly discovered evidence, this case does not present them. Plaintiff's complaint was dismissed for his failure to obey court order, for his failure to appear at his own deposition, and for his continued obstreperous conduct through the litigation, not for any weakness in the merits of his claim. The evidence plaintiff has proffered on this motion that defendants failed to turn over various documents and that plaintiff himself gave the tapes to Trabocco for safekeeping is not

evidence that plaintiff could not have discovered in the exercise of due diligence. More importantly, that evidence in no way excused plaintiff's misconduct of justifies vacatur of the dismissal.

Nor is there merit to plaintiff's contentions under Fed. R. Civ. P. 60(b))3). This rule requires clear and convincing proof of fraud, misrepresentation or other misconduct by an adverse party, Westerly Electronic Corp. v. Walter Kidde & Co., 367 F. 2d 269, 270 (2d Cir. 1966), that

prevented the movant from fully and fairly presenting the merits of this case. E.F. Hutton & Co. v. Berns, 757 F.2d 215,216 (9th Cir. 1985); Ervin v. Wilkinson, 701 F. 2d 61 (7th Cir. 1983); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Civ. 1978).

In the first place, however, plaintiff was prevented from presenting the merits of his case by his own egregious misconduct. None of the evidence produced by plaintiff -- which is irrelevant to the issue of plaintiff's misconduct -- would have altered that result. Metlyn Realty Corp.

v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985); Simmons v. Gorsuch, 715 F.2d 1248, 1253 (7th Cir. 1983). In the second place, for from demonstrating clear and convincing proof of fraud or misconduct, the evidence adduced by plaintiff rather suggests that defendants vigorously but fairly litigated this action and, unlike plaintiff, complied with court order when directed to do so.

The motion to vacate the judgment is dismissed for lack of jurisdiction. Plaintiff's application to file a new motion under Fed. R. Civ. P. 60(b)(3) is

denied. [2]

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[2]. If the plaintiff makes further motion i
relitigating these decided issues, the court wil
whether to impose cost and fees on plaintiff for

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, one the Sixteenth day of December, one thousand nine hundred and eighty-eight.

P r e s e n t: HONORABLE THOMAS J. MESKILL,

HONORABLE AMALYA L. KEARSE,

HONORABLE ROGER J. MINER,

Circuit Judges

BARRY WEINSTEIN,

Plaintiff-Appellant,

Docket No. 88-7340

v.

JACK EHRENHAUS and STANLEY MESNICK,
both individually and doing business as JACK EHRENHAUS ASSOCIATES, and JACK EHRENHAUS ASSOCIATES, a New York Partnership,

Defendants-Appellees.

This is a pro se appeal from a judgment of the United States District Court for the Southern District of New York, Leval, J., which dismissed plaintiff-appellant Barry Weinstein's complaint pursuant to Fed. R. Civ. P. 37(b) and (d) for failure to comply with discovery orders.

In his complaint, Weinstein claims that he entered into a partnership agreement with defendants-appellees Jack Ehrenhaus and Stanley Mesnick and that he is therefore entitled to an accounting for profits of the partnership. The appellees deny that Weinstein was a partner.

This cause came on to be heard on the transcript of record from said district court and was argued by appellant pro se and by counsel for the appellees.

The judgment of the district court is AFFIRMED substantially for the reasons stated by Judge

Leval in his opinion dated March 14, 1988.

Defendants' request for remand for monetary sanctions in the absence of a cross-appeal and defendants' request for sanctions on appeal are denied.

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Thomas J. Meskill, U.S.C.J.

_____

Amalya L. Kearse, U.S.C.J.

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Roger J. Miner, U.S.C.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

BARRY WEINSTEIN,

84

Civ. 5641(PNL)

Plaintiff,

ORDER

-against-

JACK EHRENHAUS and STANLEY MESNICK, both individually and doing business as JACK EHRENHAUS ASSOCIATES and JACK EHRENHAUS ASSOCIATES, a New York partnership,

Defendants.

- - - - - - - - - - - - - - - - - - - X

Dated: July 22, 1987
PIERRE N. LEVAL, U.S.D.J.

This is a motion by defendants to compel discovery as to which plaintiff claims

attorney-client and/or work-product privilege. Defendants earlier moved for sanctions against the plaintiff by reason of actions taken by the plaintiff in filing a lis pendens against the advice and without the knowledge of his attorney. In opposition to the defendants' motion and in justification of his own conduct, plaintiff offered an opinion given to him by Peter Richards, Esq. as well as statements made to him about the merits of his claims by Arthur Wolfish, Esq. and Lee Bailey. Plaintiff contended that

the opinion furnished to him and the statements made to him gave him reason to believe that his conduct was appropriate. If plaintiff relies on opinion and statements given to him by counsel and third persons, it becomes highly relevant what representations of fact plaintiff made to those persons which served as the basis of the opinion they expressed. If, for example, the plaintiff obtained those opinions and statements by advising counsel and the third persons of facts which plaintiff cannot substantiate, plaintiff's

entitlement to rely on them would be substantially impaired. Although plaintiff might have been entitled to claim the attorney-client or work-product privilege as to these opinions and statements if he had not proffered them as self-justifications, by so doing he has waived any privilege he might have had. The defendants should be entitled to explore the information furnished by plaintiff to those persons in order to rebut plaintiff's entitlement to rely on the opinions they expressed to him.

Plaintiff's objections to this discovery are overruled. Messrs. Richards, Wolfish and Bailey may be deposed.

Defendants also seek disclosure of certain tape recordings made by plaintiff during his investigations. Defendants had earlier made a discovery demand seeking disclosure of any such tape recordings in existence. Plaintiff would have been entitled at the time to avoid such disclosure by asserting the work-product privilege under Rule 26(b)(3), F.R.Civ.P. Instead of

doing so, plaintiff neglected to inform his counsel of the fact that the tape recordings had been made. As a result, an affidavit was presented to the court which omitted this fact. By reason of his failure to disclose the existence of the tape recordings in his affidavit to the court, the court finds that the plaintiff has waived the work-product privilege he otherwise would have had. Accordingly, plaintiff is directed to produce such tape recordings as he had made prior to his submission of the affidavit on April 3, 1987.

Dated: New York, N.Y.
July 22, 1987

SO ORDERED:

Pierre N. Leval, U.S.D.J.

SDN:

84-

CIV-5641
(TJM)
LEVAL (0867)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May

, one thousand nine hundred and eighty-nine.

P r e s e n t:

HONORABLE JAMES L. OAKES, Chief Judge

HONORABLE WILLIAM H. TIMBERS

HONORABLE THOMAS J. MESKILL,

Circuit Judge

BARRY WEINSTEIN,

Plaintiff-Appellant,

v.

JACK EHRENHAUS and STANLEY MESNICK, both individually and doing business as JACK EHRENHAUS ASSOCIATES, and JACK EHRENHAUS ASSOCIATES, a New York Partnership,

DOCKET No. 89-7033

Defendant-Appellees,

Barry Weinstein appeals pro se from an order entered in the United States District Court for the Southern District of New York, Leval, J., dismissing his motion to vacate a judgment

pursuant to Fed. R. Civ. P. 60(b) and denying his application to file a new motion. In his rule 60(b) motion, Weinstein attempted to reargue a decision by Judge Leval dismissing his complaint for abuse of discretion, Fed. R. Civ. P. 37(b), (d).

We AFFIRM the decision of the district court and award double costs to defendant pursuant to Fed. R. App. P. 38.

This cause came on to be heard on the transcript of record from said district court and was argued by appellant pro se and

by counsel for the appellees.

Weinstein had previously appealed the dismissal of his complaint and we affirmed that decision. No. 88-7340 (2d Cir. Dec. 16, 1988). This second appeal follows not only the dismissal of Weinstein's instant motion, but also the denial of a prior Rule 60(b) motion from which no appeal was taken.

We review the decision below for abuse of discretion. Sieck v. Russo, 869 F. 2d 131, ___ (2d Cir. 1989); Maduakolam v. Columbia University, 866 F. 2d 53, 55 (2d Cir. 1989). Because

there was no abuse of discretion, we affirm the decision of the district court. After Weinstein filed his Rule 60(b) motion, his appeal to this Court from the dismissal of his complaint, previously withdrawn without prejudice, was reinstated. The district court was then divested of jurisdiction to decide Weinstein's motion because his appeal was pending. See, International Ass'n of Machinists and Aerospace Workers v. Eastern Airlines, Inc., 847 F. 2d 1014, 1017-18 (2d Cir. 1988); United States v. Katsougrakis, 715 F. 2d

769, 776 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1084). It therefore was not improper for the district court to dismiss the motion. Even if the district court should not have dismissed Weinstein's Rule 60(b) motion, it would not have been an abuse of discretion for it to deny the motion. As the district court's memorandum and order makes clear, Weinstein's contentions do not mandate reopening the judgment under Rule 60(b).

We have considered Weinstein's other contentions and find them to be without merit.

Because of the frivolous nature of this appeal, we are assessing double costs against Weinstein under Fed. R. App. P. 38. Weinstein has attempted to reargue the merits of his complaint in this appeal, although the merits of his complaint are not at issue here. He has persisted in raising the identical issues in separate proceedings instead of consolidating his motions and appeals in a judicially economical manner. We must warn Weinstein that if he repeats this behavior, filing frivolous or

procedurally barred motions and appeals, he may subject himself to additional sanctions under both Fed. R. Civ. P. 11 and Fed. R. App. P. 38.

James L. Oakes, Chief Judge

William H. Timbers, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and it is not uniformly available

to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.